INDEX

Relevant Docket Entries—District Court.

72C-453 UNITED STATES OF AMERICA ex rel. LEON NEWSOME vs. BERNARD J. MALCOLM

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
4- 6-72	PETITION FILED FOR A WRIT OF HABEAS CORPUS.	1 JS
4- 6-72	ORDER FILED for the filing of petition, etc., without prepayment of costs, etc.	2
4- 7-72	ORDER TO SHOW CAUSE FILED WITH PROOF OF SERVICE THEREON why a writ of habeas corpus should not be granted, etc. (returnable April 10, 1972 at 10:00 A.M.—Room 2)	3
4- 7-72	Petitioner's Memorandum of Law filed.	4
4- 7-72	NOTICE OF APPEAL FILED (from the order denying relator's request for an order staying all state proceedings, etc.)	5
4- 7-72	Instructions mailed to Attorney for relator herein on preparation of record on appeal, etc. MRB	
4- 7-72	Copy of Notice of appeal was on this day mailed to Clerk, U.S.C.A. MRB	
4- 7-72	Copy of Notice of appeal was on this day mailed to Corporation Counsel, Municipal Bldg., State of N.Y., etc. MRB	
4-10-72	Before BRUCHHAUSEN, J. Hearing on order to show cause for a writ of habeas corpus, etc. adjourned to May 1, 1972 at 10:00 A.M.	

Relevant Docket Entries—District Court.

Date	Filings—Proceedings	Amount Reported in Emolument Returns
5- 1-72	Before Bruchhausen, J. Case called and adjourned to May 22, 1972.	
5-22-72	Before Bruchhausen, J. Case called. Hearing on order to show cause, etc. Motion argued. Decision reserved.	
5-23-72	By Bruchhausen, J. Memorandum and Order filed. It is ordered that the Petition be and it is hereby Dismissed. Copies hereof have been forwarded to the attorneys for the parties. (See Memo. and Order)	6 JS
5-25-72	Notice of Appeal filed (from order entered on the 23rd day of May, 1972)	7
5-25-72	Copy of Notice of appeal was on this day mailed to Clerk, U.S.C.A. MRB	
5-25-72	Copy of Notice of appeal was on this day mailed to Corporation Counsel, Municipal Bldg., State of N.Y. MRB	
5-25-72	Copy of instructions on preparation of record on appeal was on this day mailed to Robert Kasanof, Esq., The Legal Aid Society, 119 Fifth Avenue, New York, N.Y. 10003 MRB	
8- 8-72	Motion pursuant to Rule 24(a)(2) with Verified Answer annexed filed.	8
8- 8-72	Memorandum of law for the Atty General of the State of N.Y. intervenor-respondent filed.	9

Relevant Docket Entries—District Court.

Date	Filings—Proceedings	Amount Reported in Emolument Returns
8- 8-72	Record on appeal certified and given to Sandra Sadowitz for delivery to Court of Appeals. Receipt in file.	
8-11-72	Receipt returned from C/A acknowledging receipt of record, filed. (C/A No MR 5293)	10
5-21-73	Certified copy of order (U.S.C.A.) filed. Treating letter of counsel of the appellee as a motion to remand this action to the U.S.D.Court, E.D.N.Y. for a decision on the merits. Upon consideration whereof it is Ordered that this action be and hereby is remanded to the U.S.D.Court, E.D.N.Y., for a decision on the merits. MRB	11
6- 8-73	All documents in this matter were on this day returned to this office. Receipt signed and mailed to Clerk, U.S.C.A. MRB	
6-25-73	Before Bruchhausen, J. Case called. Submitted. Decision reserved.	
7-12-73	By Bruchhausen, J. Memorandum and Order filed. Ordered that the writ should be issued. It is so ordered. (See Memo., etc.) Copies have been forwarded to the attorneys for the parties. (See Memo., etc.)	12
8-13-73	Notice of Appeal filed (of Intervenor-Respondent, Louis J. Lefkowitz, Atty., Gen., State of N.Y., from orders entered herein on July 12, 1973)	13

Relevant Docket Entries—District Court.

Date	Filings—Proceedings	Amount Reported in Emolument Returns
8-13-73	Instructions on preparation of record on appeal were on this day handed personally to a representative of said respondent, etc. MRB	
8-13-73	Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A.	
8-13-73	Copy of Notice of Appeal was on this day mailed to Robert, Kasanof, Esq., Atty., for Petitioner, etc. MRB	
8-13-73	Copy of Notice of Appeal was on this day mailed to District Atty., Queens County, 125-01 Queens Blvd., Kew Gardens, N.Y., etc. MRB	
9-24-73	Memorandum of Petition filed.	14
9-24-73	Memorandum of Law filed for Intervenor-Respondent herein.	15
9-24-73	Memorandum of (Reply) petitioner filed.	16
9-24-73	Letter of Stanley Neustadter, Assistant Atty., In Charge, etc. dated July 5, 1973 addressed to Bruchhausen, H.	17

Relevant Docket Entries—Court of Appeals.

Case No. 73-2413

U.S.A. v. Attorney General of the State of New York

Date	Filings—Proceedings
8-14-73	Filed copy of notice of appeal (Atty. Gen. of the State of N.Y.)
9-24-73	Received docket fee
9-24-73	Filed record (original papers of District Court)
11- 7-73	Filed motion to dismiss appeal, p/s
11-27-73	Filed motion to extend time to file brief and appendix of appellant, p/s
11-27-73	Filed order denying motion to dismiss appeal; appellant to file brief and appendix by 12-11-73; appellee's brief to be filed by 12-25-73; argument of appeal to be heard first week in January 1974
12-11-73	Filed appendix, p/s
12-11-73	Filed brief, appellant, p/s
12-26-73	Filed brief, appellee, p/s (4 copies)
1-11-74	Argument heard (by: Kaufman, Smith, and Feinberg)
1-28-74	Judgment affirmed, Kaufman, CCJ
1-28-74	Filed judgment
4-16-74	Issued mandate (opinion and judgment)
5- 3-74	Filed notice of filing of petition for writ of certiorari (S.C. No. 73-1627)
6-24-74	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (SC# 73-1627)

Petition for a Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

72 Civ. 453

UNITED STATES OF AMERICA *ex rel.* LEON NEWSOME,

Petitioner,

against

BERNARD J. MALCOLM, New York City Commissioner of Correction, JOHN J. CUNNINGHAM, Warden, New York City Correctional Center for Men, RICHARD NEWHALL, Deputy Warden, Queens Court Detention Pens,

Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEON NEWSOME, being duly sworn, deposes and says:

I will be incarcerated by the Respondents on April 11, 1972, when I surrender in Part 1E of the New York City Criminal Court, Queens County pursuant to a judgment of conviction rendered therein on May 7, 1970. I submit this verified petition in support of my application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

No prior application has been made by me in any federal court for a writ of habeas corpus; nor is there any other proceeding concerning my imminent detention currently pending in any state or federal court.

On May 7, 1970, I was convicted by the Criminal Court, Queens County, of loitering (N.Y. Penal Law § 240.35 [6])

after trial, and of attempted possession of dangerous drugs (N.Y. Penal Law § 220.05; 110.00) upon my plea of guilty. I was sentenced that day to an unconditional discharge on the loitering conviction, and to 90 days for the possessory charge.

Execution of sentence was immediately stayed pursuant to a certificate of reasonable doubt [pursuant to N.Y. Code of Crim. Proc. § 527] when I posted $100.00 cash bail on the date I was sentenced (May 7, 1970). The stay was extended and bail continued on two subsequent occasions in state court [Part 1E, Queens County Criminal Court, July 22, 1971 and December 1, 1971] at which I appeared; indeed, since the very inception of the charges against me, I have appeared in court at all times when my presence was required.

All state remedies having been exhausted, however, the stay of execution of sentence will expire on April 11, 1972, at which time I must, and will, surrender into the custody of the Respondents to commence service of the 90-day sentence which, upon information and belief, will be served at the New York City Correctional Center for Men on Rikers Island. No requests for further extending the stay of execution are pending in any state court.

My imminent custody is illegal because the conviction for attempted possession of drugs and the 90-day sentence imposed thereon is predicated upon evidence seized incidental to my arrest under the color of an unconstitutionally vague and overbroad statute purporting to prohibit "loitering . . . under circumstances which justify suspicion", an arrest which violated my rights to be free of unreasonable searches and seizures and to due process of law under the Fourth and Fourteenth Amendments of the United States Constitution.

A hearing held on April 7, 1970 on my motion to suppress evidence established the following facts, which are more

fully set forth in the accompanying memorandum of law:

On the evening of February 12, 1970, I entered the lobby of a City Housing Authority apartment house with an acquaintance.

Shortly after we arrived, a uniformed Housing Authority patrolman entered and quickly asked me what I was doing there. I told him, "I am not doing anything", and explained to him that I had just arrived. The officer then asked me for identification, but when I was unable to produce any, I was arrested for loitering. The officer then searched me and found a closed zippered pouch which he opened to find some heroin and hypodermic instruments. My friend was not arrested.

At the trial level, my assigned lawyer argued that the evidence was insufficient to convict me of loitering; that my arrest for loitering was unreasonable and was without probable cause; and that the loitering statute pursuant to which I was arrested was unconstitutional. These arguments were rejected, and the trial court denied my motion to suppress the evidence seized incident to the loitering arrest and found me guilty of the loitering charge as well.

The same arguments were raised on appeal to the Appellate Term, Second and Eleventh Judicial Districts. On June 21, 1971, that court reversed the loitering conviction, but held that there was probable cause to arrest me for loitering, affirming the order denying the motion to suppress evidence.

The opinion of the Appellate Term is not officially reported and is annexed as Appendix A; the order and judgment of affirmance is annexed as Appendix B.

Leave to appeal to the New York Court of Appeals was denied on July 14, 1971 by Associate Judge Breitel; a copy of the certificate denying leave to appeal is annexed as Appendix C.

Petition for a Writ of Habeas Corpus.

The United States Supreme Court denied my petition for a writ of certiorari on February 22, 1972 [30 L. Ed. 2d 779, sub nom. *Newsome* v. *New York*].

WHEREFORE, I respectfully request that a writ of habeas corpus issue on the ground that the conviction pursuant to which I must serve a 90-day sentence to commence April 11, 1972, was predicated upon evidence seized incidental to an unlawful arrest under the color of an unconstitutionally vague and overbroad loitering statute in violation of my constitutional rights under the Fourth and Fourteenth Amendments.

(Petition verified by Leon Newsome April 6, 1972. Verification Omitted in Printing.)

APPENDIX A.

Opinion of the Appellate Term.

Judgment of conviction unanimously modified on the law and facts by reversing the conviction of loitering and dismissing that charge, and, as so modified, judgment of conviction affirmed.

The evidence was insufficient to establish beyond a reasonable doubt defendant's guilt of loitering in violation of Section 240.35 of the Penal Law. Moreover, insofar as the information charged defendant with loitering, it was jurisdictionally defective (*People* v. *Schanbarger*, 24 N.Y.2d 288). However, there was probable cause to arrest defendant on that charge and the subsequent search disclosing the presence of narcotics and narcotic instruments on defendant's person was lawful (*Henry* v. *United States*, 361 U.S. 98, 102-103; *People* v. *Maize*, 32 AD2d 1031. Cf. *People* v. *Rosemond*, 26 NY2d 101; *People* v. *Peters*, 18 NY2d 238, 246-247, affd. 392 U.S. 401.

Petition for a Writ of Habeas Corpus.

APPENDIX B.

At a term of the Appellate Term of the Supreme Court of the State of New York for the 2nd and 11th Judicial Districts, held in Kings County, on the 21st day of June, 1971.

Cal. No. 2(Q)
Feb./'71.

Present—Hon. William B. Groat,
Presiding Justice
" " Dominic S. Rinaldi,
" " John E. Cone,
Justices

The People of the State of New York,
Respondent,

vs.

Leon Newsome,
Appellant.

The above named Leon Newsome, the defendant herein, having appealed to this Court from judgments of the Criminal Court of the City of New York, County of Queens, rendered on the 7th day of May, 1970, convicting him of a violations of

Section 240.35 (6), Penal Law,
Section 110.00, Penal Law,

and imposing sentence as follows:

Section 240.35 (6) —Unconditional Discharge,
Section 110.00 —90 Days in New York City Reception and Classification Center,

and the said appeal having been argued by Mr. Stanley Neustadter, of counsel for the appellant, and argued by Mr. Thomas A. Duffy, Jr., of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgment of conviction so appealed from be, and the same is hereby, unanimously modified on the law and facts by reversing the conviction of loitering and dismissing that charge and, as so modified, judgment of conviction affirmed.

D S. R.
Justice, Appellate Term

APPENDIX C.

STATE OF NEW YORK
COURT OF APPEALS

Before: HON. CHARLES D. BREITEL, Associate Judge

CERTIFICATE DENYING LEAVE

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
against
LEON NEWSOME,
Defendant-Appellant.

Petition for a Writ of Habeas Corpus.

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
July 14, 1971

CHARLES D. BREITEL
Associate Judge

• Stanley Neustadter, Esq.
Legal Aid Society
119 Fifth Avenue
New York, New York

Hon. Thomas J. Mackell
District Attorney, Queens County
125-05 Hoover Avenue
Jamaica, New York

Hon. Raymond J. Cannon, Clerk
Court of Appeals

• Briefs returned at office

Judgment of Crim. Ct., Queens Co. 5-7-70, affm. App. Term 2d & 10th 6-2.

•Briefs returned at office.

Minutes of Plea of Guilty and Sentence.*

CRIMINAL COURT OF THE CITY OF NEW YORK
PART 2 B : COUNTY OF QUEENS

Docket: A 936

Charge: 240.35-6
220.45
220.05

Sentence

PEOPLE OF THE STATE NEW YORK

against

LEON NEWSOME,

Defendant.

May 7, 1970

125-01 Queens Blvd.
Kew Gardens, New York

Before: HON. ABRAHAM M. ROTH, Presiding Judge

APPEARANCES:

RALPH BEISNER, Esq.
Assistant District Attorney
For the People

MICHAEL JAY, Esq.
Legal Aid Society
For the Defendant

ESTER KALISH,
Court Reporter.

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* Handed up as an exhibit to the District Court and Court of Appeals and included in the appendix by agreement of the parties.

Minutes of Plea of Guilty and Sentence.

[2] Court Officer: Number 16 on the calendar, Leon Newsome, A936, charged with Section 240.35-6, 220.45, 220.05.

Mr. Jay: Your Honor, may we approach the bench?

(Off Record Discussion at Bench)

Mr. Jay: Your Honor, at this time, in view of the fact that the defendant was found guilty after trial on a charge of loitering and subsequent to that charged and as a result of that arrest, the defendant was subsequently charged with possession of drugs, and that there was a motion to suppress, the opinion of the Court was delivered on the same day as the trial for loitering, and the motion to suppress was denied on the basis that the arrest for the loitering was a lawful arrest, and at that time constitutional objections were made to the charge of loitering and the motion to suppress was had on the basis that were it [3] not for the fact that the loitering charge were unconstitutional, the drug charge would not have been sustained, would not be sustainable by the People. In view of the fact that the Criminal Court has seen fit to hold the defendant and deny the motion to suppress, the defendant at this time would withdraw any previously entered plea and enter a plea of guilty to 110—220.05 of the Penal Law, attempted possession of dangerous drugs. The defendant is so pleading in view of the fact that the motion to suppress was denied, and in view of the fact that the Criminal Court denied the motion to suppress, in view of the fact that the Court had already established a basis for lawfull arrest by the constitutionality of the loitering charge. For the record, your Honor, I have been—I have informed the [4] defendant of his right to appeal on the charge of loitering and on the motion to suppress.

The Court: Do you, defendant, now withdraw pleas of not guilty and offers to plead guilty to attempt possession of dangerous drugs to cover; is that correct?

Mr. Jay: That's correct.

Mr. Beisner: That plea is acceptable to the People, your Honor.

Judge Roth: Take his plea.

Mr. Beisner: Are you Leon Newsome?

Defendant: Yes, sir.

Mr. Beisner: You are charged with the crime of attempted possession of dangerous drugs in the fourth degree, in that on February 12, 1970, about 10:20 P.M.—in that on February 12, 1970, about 2:20 P.M., at 81-03 Hammils Boulevard, in the County of Queens, you did knowingly [5] and unlawfully have in your possession a quantity of heroin. How do you plead to those charges?

Defendant: Guilty.

Judge Roth: Are you pleading guilty to the charge of attempted possession of this dangerous drug, to wit, heroin? And that on February 12, 1970, the vicinity of 81-03 Hammels Boulevard, the County of Queens, City and State of New York, you had possession of that drug—you attempted to have possession of that drug; is that true?

Defendant: Yes.

Judge Roth: And nothing was [6] promised to you in reactually are guilty of that charge; is that so, sir?

Defendant: Yes.

Judge Roth: And before you plead guilty, you discussed this matter with your lawyer?

Defendant: Yes.

Judge Roth: And nothing was promised to you in regard to a sentence to induce you to plead guilty; is that correct?

Defendant: No.

Mr. Jay: Your Honor, for the record, I believe that the proper charge is possession of a dangerous drug in the 6th degree of the new amendment to the Penal Law.

Mr. Beisner: That's correct, 220.05.

Minutes of Plea of Guilty and Sentence.

Judge Roth: 220.05, I have that, dangerous drug in the 6th degree. I will so mark the papers.

Mr. Jay: Yes, your Honor.

Judge Roth: All right, defendant waives the 48 hours?

Mr. Jay: He does, your Honor.

Judge Roth: Any legal cause why sentence should not now be imposed?

Mr. Jay: There is none.

Judge Roth: Is there anything you wish to say?

[7] Mr. Jay: Yes, your Honor. The defendant informs me that he is gainfully employed. He is living with his mother; has been a resident in the State for a considerable amount of time. I'd ask the Court, in view of the fact the defendant has plead guilty, to be as lenient, as merciful as possible in imposing sentence.

Judge Roth: Anything else you wish to say in addition to what your lawyer has just said?

Defendant: No.

Judge Roth: Defendant is committed to the New York City Reception Center for a period of ninety days.

Mr. Jay: Your Honor, at this time, the defendant respectfully makes application to the Court for a certificate of reasonable doubt in view of the fact, your Honor, that we believe there are issues here that may be adjudicated upon by the Appellate [8] Term, in view of the fact that a constitutional question has been raised in reference to the loitering charge and the subsequent motion to suppress is based upon that loitering charge.

Judge Roth: The Court feels there is a question of law involved here, very serious question of law, with regard to the loitering charge. And in view of that, the Court will grant a certificate, and submit the order, I will sign it, of reasonable doubt.

Mr. Jay: Thank you, your Honor.

Judge Roth: All right.

Court Officer: Put him back.
Judge Roth: Also fingerprint the defendant.

* * *

Certified to be a true and correct transcript of minutes in this case.

ESTHER KALISH,
Official Court Reporter.

Memorandum and Order of the District Court.

72 C 453

July 12, 1973

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel. LEON NEWSOME,

Petitioner,

against

BERNARD J. MALCOM, New York City Commissioner of Correction, JOHN J. CUNNINGHAM, Warden, New York City Correctional Center for Men, RICHARD NEWHALL, Deputy Warden, Queens Court Detention Pens,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Respondent.

MEMORANDUM and ORDER

Memorandum and Order of the District Court.

BRUCHHAUSEN, D. J.

The petitioner applies for a writ of habeas corpus. He challenges the constitutionality of the State statute, which he was convicted of violating.

This Court by its memorandum and order dated May 23, 1972 dismissed the petition on the ground that the petitioner was not in custody within the meaning of the Habeas Corpus Statute, 28 U. S. C. 2241.

The Circuit Court of Appeals for the Second Circuit, by order dated April 26, 1973 remanded the action for a decision on the merits.

Thereafter, the Court of Appeals of the State of New York handed down its opinion in the case of The People & C., respondent v. Alan Berck, decided July 2, 1973 held that Section 240.35 (6)—Loitering is unconstitutional, that the that conviction should be reversed and the complaint dismissed.

It follows, therefore, that the writ should issue.

It is so ordered.

Copies hereof have been forwarded to the attorneys for the parties.

WALTER BRUCHHAUSEN
Senior U. S. D. J.

Decision of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 693—September Term, 1973.

(Argued January 11, 1974 Decided January 28, 1974.)

Docket No. 73-2413

UNITED STATES OF AMERICA ex rel.
LEON NEWSOME,

Petitioner-Appellee,

v.

BENJAMIN J. MALCOLM, New York City Commissioner of Correction, JOHN J. CUNNINGHAM, Warden, New York City Correctional Center for Men, RICHARD NEWHALL, Deputy Warden, Queens Court Detention Pens,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

Intervenor-Respondent-Appellant.

Before:

KAUFMAN, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from an order granting a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2254, entered in the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge.*

Affirmed.

ROBERT S. HAMMER, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), *for Intervenor-Respondent-Appellant.*

STANLEY NEUSTADTER, New York, New York (William J. Gallagher, The Legal Aid Society, on the brief), *for Petitioner-Appellee.*

KAUFMAN, *Chief Judge:*

This appeal presents the rare instance where by granting a writ of habeas corpus to a state prisoner we intrude less into local administration of criminal justice than if we were to follow the contrary course suggested by the state Attorney General. Judge Bruchhausen granted Leon Newsome's petition pursuant to 28 U.S.C. 2254 because the loitering statute under which Newsome was arrested has been declared unconstitutional by the New York Court of Appeals. Since Newsome is collaterally attacking a conviction not for loitering, but for a narcotics violation arising from evidence seized at the time of his arrest for loitering, his petition raises an interesting question of Fourth Amendment law. We agree with the New York Court of Appeals in its evaluation of the loitering statute and, because of the particular constitutional infirmities involved, are compelled to conclude that the writ should issue. We affirm.

I. FACTUAL BACKGROUND

The essential facts are not in dispute and can be related briefly. On February 12, 1970, New York City Housing Authority Policeman Warren J. Ungar and a fellow officer

responded to an anonymous telephone call "to the effect that someone was in the hallway" of a City Housing Authority dwelling at 81-03 Hammel Boulevard, Queens, New York. The patrolmen entered the building at approximately 10:20 p.m. and immediately approached two men—Leon Newsome and an unidentified companion—who were standing in the lobby near the main doorway. In response to Ungar's questions, Newsome said he had just entered the building. When Newsome was unable to produce identification, he was arrested for loitering (N.Y. Pen. L. 240.35(6)) and searched incident to that arrest. Patrolman Ungar placed Newsome against the wall and "went through the pockets." This search produced a closed black leather pouch in which Ungar found a functional hypodermic instrument and a glassine envelope later determined to contain 2 grains of heroin. Accordingly, Newsome was also charged with possession of dangerous drugs (N.Y. Pen. L. 220.05) and criminal possession of a hypodermic instrument (N.Y. Pen. L. 220.45).

After a brief nonjury trial before Criminal Court Judge Nicholas Tsoucalas on April 7, 1970, Newsome was convicted for loitering. Judge Tsoucalas immediately proceeded to conduct a hearing on Newsome's motion to suppress the evidence seized at the time of his arrest.[1] Newsoms raised and Judge Tsoucalas rejected the same claims at trial and on the motion to suppress: that the patrolmen did not have probable cause to arrest Newsome for loitering and that the loitering statute was unconstitutional and could not therefore serve as the basis for searches incident to arrests.

On May 7, 1970, the date scheduled for a trial on the drug charges, Newsome appeared before Judge Abraham Roth and withdrew his prior pleas of not guilty and pleaded guilty to the lesser charge of "attempted possession

[1] Patrolman Ungar was the only witness at the loitering trial and the suppression hearing.

of dangerous drugs" (N.Y. Pen. L. 110(6)). He was sentenced immediately to 90 days in the City Reception Center, and received an unconditional release for the loitering conviction. The minutes of the May 7 proceedings clearly disclose Newsome's intention to appeal both the loitering conviction and, pursuant to N.Y. Code. Crim. P. 813-c,[2] the denial of his motion to suppress. Indeed, at the close of proceedings on May 7, Judge Roth granted a certificate of reasonable doubt (N.Y. Code. Crim. P. 527) because "there is a question of law involved here, very serious question of law, with regard to the loitering charge." On direct appeal to the Appellate Term, the loitering conviction was reversed for insufficient evidence; but, because the court found that probable cause existed to arrest Newsome for loitering, the search incident to that arrest was held valid and the drug conviction affirmed.[3] Leave to appeal to the New York Court of Appeals was denied and a petition for a writ of certiorari was denied *sub nom. Newsome* v. *New York,* 405 U.S. 908 (1972). The instant petition for a writ of habeas corpus was filed on April 6, 1972,[4] just five days before Newsome was to begin serving his 90 day sentence (imposition of which had been stayed pending appeal).[5]

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[2] Presently codified as N.Y. Crim. Proc. L. 710.70(2).

[3] The Appellate Term disposed of Newsome's appeal by issuing a summary order which is silent on the constitutional claims.

[4] Although Newsome has not pursued state avenues of collateral attack, his federal claims were presented to the state courts on direct appeal. He has, therefore, satisfied the exhaustion requirement, *Picard* v. *Connor,* 404 U.S. 270, 275 (1971), and the state makes no claim to the contrary.

[5] On May 23, 1972, Judge Bruchhausen dismissed the petition because Newsome was not "in custody" as required by 28 U.S.C. 2241. On appeal, we remanded by summary order (April 26, 1973) (72-1875) for a disposition on the merits, in light of the Supreme Court's holding on the custody question in *Hensley* v. *Municipal Court,* 411 U.S. 345 (1973).

Decision of the Court of Appeals.

On July 2, 1973, prior to Judge Bruchhausen's final disposition on the merits, the New York Court of Appeals in a well-reasoned opinion declared § 240.35(6) unconstitutional on its face because, among other infirmities, it was overly vague. *People* v. *Berck*, 32 N.Y.2d 567, 347 NYS2d 33 (1973), *cert. denied sub nom. New York* v. *Berck*, 42 U.S.L.W. 3352 (Dec. 11, 1973). On July 12, 1973, Judge Bruchhausen granted the writ.[6] The New York State Attorney General, who had not appeared in prior proceedings in this case, requested and was granted leave to intervene as a respondent on the present appeal.

II. Standing

As a threshold issue, the Attorney General raises the not unfamiliar claim that Newsome is without standing to pursue his underlying constitutional attacks on the drug conviction because those claims were waived when Newsome pleaded guilty. Ordinarily, it is true that an intelligent and voluntary guilty plea waives a defendant's right to trial and all claims of constitutional infirmities in the prosecution, which could have been raised at trial. *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Brady* v. *United States*, 397 U.S. 742 (1970).[7] But in *McMann* v. *Richardson*, the Supreme Court noted that an exception to the general waiver rule exists

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[6] Apparently because of a clerical error, Judge Bruchhausen's memorandum and order incorrectly indicate that Newsome is attacking a conviction for loitering. As noted above, the loitering conviction was vacated by the Appellate Term and the instant petition attacks the drug conviction.

[7] After a defendant pleads guilty on advice of counsel, "[t]he focus of federal habeas inquiry is the nature of the advice, and the voluntariness of the plea, not the existence as such of an anteceedent constitutional infirmity." *Tollett* v. *Henderson, supra*, 411 U.S. at 266.

where state law permits a defendant to retain his collateral claims after pleading guilty. 397 U.S. at 766. New York is one of those states which permit a defendant to appeal specified adverse pretrial rulings even though he subsequently pleads guilty. The operative statutory provision at the time Newsome pleaded guilty was N.Y. Code Crim. P. 813-c, which stated: "the order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

We have characterized the New York procedure as "enlightened" for it permits a defendant whose sole defense is one of the specified constitutional claims, neither to suffer nor impose on the state the burden of going to trial simply to preserve his claim—a procedure which precipitated the enactment of § 813-c.[5] *See United States ex rel. Rogers* v. *Warden,* 381 F.2d 209, 214 (2d Cir. 1967). This new procedural device manifested obvious legislative determinations that trials are not to be encouraged in order to preserve a ground for appeal and that guilty pleas in such cases would aid in avoiding additions to beleagured trial calendars. Accordingly, the rule in this circuit is well established that a New York defendant who has utilized § 813-c in the state courts may pursue his constitutional claim on a federal habeas corpus petition, for "it would be anomalous if a defendant by scrupulously following a sanctioned and reasonable state procedure for preserving his federal constitutional claims on appeal in state courts, simultaneously waived his right to present these same claims to a federal court . . . because he was lulled into following state procedures." *Id.* at 214-15. *See United States ex rel. Stephen J.B.* v. *Shelly,* 430 F.2d 215, 217

[5] A companion section, 813-g (presently codified as N.Y. Crim. Proc. L. 710.20(3), 710.70(2)), permitted similar appeal from the denial of a motion to suppress an allegedly coerced confession.

& n. 3 (2d Cir. 1970); *United States ex rel. Molloy* v. *Follette*, 391 F.2d 231 (2d Cir. 1968).

The Attorney General, despite our clear pronouncements on the issue, contends again, as he did in *Molloy* and *Stephen J.B.*, that we should abandon the rule first announced in *Rogers* and close the avenue of federal habeas to state petitioners who have entered pleas of guilty under the circumstances we have recounted. Again, we reject this argument and reaffirm our view that where state law permits a defendant to plead guilty without forfeiting his appeals on collateral constitutional claims, it would be a trap to the unwary if a defendant who waived his right to trial in reliance on the state appeal procedures was thereafter precluded from pressing his federal constitutional claims in the district court. We believe, moreover, that were we to nullify the vitality of § 813-c and similar statutes for federal habeas purposes, most defendants with competent counsel would be dissuaded from pleading guilty and instead would proceed to trial for the sole purpose oof preserving claims for potential vindication on state review or federal habeas. The New York legislature passed § 813-c to prevent precisely this eventuality and federal courts should be reluctant to interfere with a state's administration of criminal justice, particularly when the result would be to add to its already congested criminal trial calendars. Accordingly, we refrain from confronting the state courts with a problem the legislature has attempted to ameliorate. We are of the view that the more appropriate forum for the Attorney General to express his dissatisfaction with § 813-c is the state legislature, not the federal courts.

As a final attack on our *Rogers-Molloy-Stephen J.B.* line of cases, the Attorney General contends that *Tollett* v. *Henderson, supra,* precludes all state prisoners who pleaded guilty from asserting collateral constitutional claims in federal habeas petitions—notwithstanding state

procedures which allow the defendant to retain those claims for purposes of *state* post-conviction remedies. In our view, *Tollett* does not stand for this proposition. In *Tollett* a Tennessee prisoner attacked his 25 year old conviction (entered after a guilty plea) for first degree murder on the ground that blacks were systematically excluded from the grand jury that indicted him. Tennessee had no procedure analogous to § 813-c for preserving constitutional claims after pleading guilty. The Supreme Court held that:

> after a criminal defendant pleads guilty on the advice of counsel he is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected. The focus of federal habeas inquiry is the nature of the advice and voluntariness of the plea, not the existence of such of an antecedent constitutional infirmity.

411 U.S. at 266. To be sure, *Tollett* did not mention the exception cut out in *McMann,* and to which we have referred, for states which provide for the preservation of constitutional claims, but given the absence of this type of provision in Tennessee law, that question was not before the court in *Tollett* and repetition of the principle would have been superfluous. Accordingly, we refuse to undertake the hazardous task of elevating silence to the level of *stare decisis.*[9] When, as here, a defendant enters

[9] A split panel of the Ninth Circuit has apparently concluded that the exception noted in the *McMann* has not survived *Tollett*. *Mann* v. *Smith* (9th Cir. July 9, 1973) (71-1932), slip op. *petition for cert. pending* 42 U.S.L.W. 3363 (Dec. 18, 1973). The language to this effect in the *Mann* majority opinion must be considered dicta, however, since the petitioner had not in fact availed himself of state post-plea appellate procedures. *Mann, supra,* at 2 n. 1. The court commented that the failure to appeal in state court cou-

(*footnote continued on following page*)

a plea of guilty and then follows acknowledged state procedures for preserving his claims, the guilty plea does not act as an automatic waiver.

III. Constitutionality of New York's Loitering Statute

Section 240.35(6) provides:

> A person is guilty of loitering when he: . . . Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes. . . .

We have noted that the New York Court of Appeals has already declared this provision unconstitutional on its face. *People* v. *Berck, supra.* In the instant proceeding, the Attorney General urges us, in effect, to instruct the state's highest court that its evaluation of a state statute was erroneous. Since the state court grounded its decision on the federal rather than the state Constitution, we must make an independent determination of the applicable federal standards. *See Townsend* v. *Sain,* 372 U.S. 293, 318 (1963). Accordingly, the question before us on this application for federal habeas corpus relief is whether the section violates due process. We conclude that it does.

(*footnote continued from preceding page*)

pled with an apparent plea bargain was "more consistent with a relinquishment of his Fourth Amendment claims than an attempt to preserve them." *Id.* Although we do not agree with the Ninth Circuit's reading of *Tollett's* impact on *McMann,* our holding is not inconsistent with the determination that a defendant who fails to invoke available state procedures will not automatically benefit on federal habeas from the mere existence of those procedures.

When § 240.35(6) became effective on September 1, 1967, it represented New York's formulation of a dragnet approach to the maintenance of public order that had its roots in feudal England and which has survived, despite considerable disapproval, in urban America. Originally conceived as a method to keep unemployed laborers from wandering between towns and terrorizing travelers, laws against vagrancy and loitering have been transformed into devices for preventing crime and for removing so-called nuisances—mobs and individual "undesirables"—from public places.[10] Despite the obvious governmental interest in preserving public order, a vagrancy-loitering statute will run afoul of the Constitution when its necessarily broad scope is stated in language so indefinite that it fails to:

> "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States* v. *Harris*, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill* v. *Alabama*, 310 U.S. 88; *Herndon* v. *Lowry*, 301 U.S. 242.

Papachristou v. *Jacksonville*, 405 U.S. 156, 162 (1972). Moreover, because the crime prevention components of loitering statutes are aimed at suspected or potential rather than incipient or observable conduct, they may conflict with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause, *Beck* v. *Ohio*, 379 U.S. 89 (1964); *Henry* v. *United States*, 361 U.S. 98 (1959). See *Papachristou* v. *Jacksonville*, *su-*

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[10] *See generally* Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1 (1960); Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603 (1956); Lacey, Vagrancy and Other Crimes of Personal Conditions, 66 Harv. L. Rev. 1203 (1953).

pra; Palmer v. *Euclid,* 402 U.S. 544 (1971). Indeed, it has been suggested that:

> because the elements of the . . . offense are obscure even officers engaged in its good faith enforcement cannot gauge justification for . . . arrests consistently with Fourth Amendment principles.

Hall v. *United States,* 459 F.2d 831, 837 (D.C. Cir. 1972) (en banc).

Turning from our brief discussion of the history and purposes of vagrancy legislation to the specific statute in issue, we must scrutinize the New York statute, *Palmer,* ance with the standard enunciated in *Papachristou, Palmer,* and *Smith* v. *Florida,* 405 U.S. 172 (1972). Under the first prong of the vagueness test (*Papachristou* v. *Jacksonville, supra,* 405 U.S. at 162, *quoting, United States* v. *Harriss, supra,* 347 U.S. at 617) we must determine whether the statute's prohibitions are cast in terms sufficiently precise to give a reasonably intelligent person notice of the conduct that is proscribed. *See Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939). Newsome contends that the operative language is so indefinite that even a citizen who had "read and studied" the statute in an effort to regulate his behavior would be in a quandary. He suggests, moreover, that the linguistic imprecision is exacerbated because § 240.35(6) imposes criminal liability in the absence of criminal intent, a factor noted by the Supreme Court in *Papachristou,* 405 U.S. at 162. It is urged, therefore, that the elements of loitering may be established by suspicious circumstances of which a citizen may not be cognizant and for which he may bear no responsibility. The Attorney General asserts, on the other hand, that § 240.35(6) can be distinguished from the statutes disapproved in *Papachristou, Palmer,* and *Smith,* because it "focuses upon specifically criminal conduct."

On its face, the statute discloses that "loiter[ing]" "remain[ing]" or "wander[ing]" in an unspecified place for an unspecified period of time without apparent reason can establish the first element of the offense. Surely a citizen who sought to conform his conduct to this provision would be unable to discern whether he risked criminal responsibility by taking a leisurely stroll, by sitting briefly on a park bench, or by seeking shelter from the elements in the doorway of a building.

The second substantive component of the statute is established by "circumstances which justify suspicion that [a person] may be engaged or about to engage in crime."[11] Yet, such "circumstances" may reflect the "whim of the policeman," *People* v. *Berck, supra,* 347 N.Y.S.2d at 38, rather than the conduct of an individual who happened to "wander" into the midst of the police, thereby creating the "hazard of being prosecuted for knowing but guiltless behavior." *Baggett* v. *Bullitt,* 377 U.S. 360, 373 (1964). With nothing more, the "suspect" is hardly offered a bright line test for distinguishing the licit from the illicit.

Moreover, there are insufficient guidelines for enforcement and thus § 240.35(6) does not pass constitutional muster on this ground as well. The section permits arrests and convictions for suspicion or for possible crime based on circumstances less compelling than the reasonable and articulable factors which are required to sustain a mere on-the-scene frisk. *Terry* v. *Ohio,* 392 U.S. 1 (1968); *Sibron* v. *New York,* 392 U.S. 40 (1968). It has been noted, and we agree that the section could lend itself to the abuse

[11] As construed by the New York courts, the third condition of § 240.35(6) ("upon inquiry . . . defendant refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes") is not in fact a substantive element of the crime of loitering. Rather, the police inquiry is a "procedural condition" to arrest under the statute. *People* v. *Schanbarger,* 24 N.Y.2d 288, 291-92, 300 N.Y.S.2d 100, 101-02 (1969). *See People* v. *Berck, supra,* 347 N.Y.S.2d at 36 n. 2.

of pretextual arrests of people who are members of unpopular groups or who are merely suspected of engaging in other crimes, without sufficient probable cause to arrest for the underlying crime.[12] For example, in *People* v. *Williams*, 55 Misc. 2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967), the court commented that:

> these defendants are 41 of a group of alleged prostitutes who have been arrested and detained 2500 times for disorderly conduct and loitering in New York City since August 18th. . . . This Court of its own knowledge is aware that except for a few isolated instances where defendants pleaded guilty, the disorderly conduct cases were dismissed. In many instances, "the girls" were arrested after 11:30 P.M., too late to be arraigned, night court had been adjourned, then kept overnight in a cell. In the morning they were brought to Court and released because the offenses for which they had been arrested could not be proven to have been committed by them.

286 N.Y.S.2d at 577. *See* Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205, 220-28 (1967); Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1, 8 1960); Lacey, Vagrancy and Other Crimes of Personal Condition, 66 Harv. L. Rev. 1203, 1219-24 (1953). *See also Winters* v. *New York*, 333 U.S. 507 540 (1948) (Frankfurter, *J.*, dissenting).

To the extent the statute can be interpreted to support dragnet, street-sweeping operations absent probable cause of actual criminality, it conflicts with established notions

[12] We note, however, that there is no suggestion that Newsome was the target of a pretextual arrest and search, or that the officers failed to act in good faith.

of due process. *Beck* v. *Ohio, supra; Henry* v. *United States, supra; Wong Sun* v. *United States,* 371 U.S. 471, 479-82 (1963). Even in the absence of purposeful circumvention of traditional standards for lawful arrests, § 240.35(6) confers discretion that is simply too unbridled to satisfy due process standards. The "infirmity" lies in the imprecision of the statute, not the subjective intent of enforcement officials. The Supreme Court has noted, "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett* v. *Bullitt, supra,* 377 U.S. at 373.[13]

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[13] The defects which we find in § 240.35(6), and which were discussed by the New York Court of Appeals in *Berck,* are neither obscure nor manifestations of recent shifts in the law. The commentary accompanying § 240.35(6) in the New York Penal Law indicates that the subdivision was a new and "controversial" amendment. Subdivision 6 created a catch all category to supplement other loitering provisions which specify with greater precision the conduct they proscribe. *See* N.Y. Pen. L. § 240.35. The court in *Berck* commented that subdivision 6 was patterned after § 250.12 of Tentative Draft 13 of the Model Penal Code. The American Law Institute abandoned that formulation, however, in its Proposed Official Draft precisely because the vagueness of the tentative draft was subject to the abuse of arrest and searches without probable cause. ALI, Model Penal Code, § 250.6, Proposed Official Draft at 227 (1962).

Even before the New York Court of Appeals struck down § 240.35(6), the lower state courts had experienced difficulty in interpreting the statute in a consistent manner to ensure even-handed enforcement. Three lower courts had declared § 240.35(6) unconstitutional (*People* v. *Bambino,* 69 Misc. 2d 387, 329 N.Y.S. 2d 922 (Nassau County Ct. 1972); *People* v. *Villaneuva,* 65 Misc. 2d 484, 318 N.Y.S.2d 167 (Long Beach City Ct. 1971); *People* v. *Beltrand,* 63 Misc. 2d 1041 (New York City Crim. Ct.) *aff'd on other grounds,* 67 Misc. 2d 324, 324 N.Y.S.2d 477 (App. Term 1971)); two had upheld the statute in the face of constitutional challenges (*People* v. *Taggart,* 320 N.Y.S.2d 671 (Suffolk Dist. Ct. 1971); *People* v. *Strauss,* 320 N.Y.S.2d 628 (Nassau Dist. Ct. 1971)); and one court has expressed doubts over its constitutionality although it did not reach the ultimate question (*People* v. *Williams,* 55 Misc. 2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967)).

Applying the standards enunciated in *Papachristou, Palmer,* and *Smith,* we conclude, as did the New York Court of Appeals in *Berck,* that § 240.35(6) contravenes the Due Process Clause of the Fourteenth Amendment not only because it fails to specify adequately the conduct it proscribes, but also because it fails to provide sufficiently clear guidance for police, prosecutors, and the courts so that they can enforce the statute in a manner that is consistent with the Fourth Amendment. Accordingly, Newsome's arrest pursuant to that section was unlawful.

IV. Search Incident to Arrest

Having concluded that Newsome's arrest pursuant to an unconstitutional statute was unlawful, we turn our attention to whether the search conducted incident to that arrest was also unlawful. For the reasons set forth, we conclude that the search in this case was constitutionally invalid, that the evidence thus seized must be suppressed and that, accordingly, the writ should issue.

Searches incident to arrest comprise a well-recognized exception to the warrant requirement of the Fourth Amendment. This exception, of course, does not reduce the level of constitutional protection because it retains the safeguard that probable cause must exist to justify the intrusiveness of the underlying arrest. *United States* v. *Robinson,* 42 U.S.L.W. 4055 (Dec. 11, 1973); *Gustafson* v. *Florida,* 42 U.S.L.W. 4068 (Dec. 11, 1973). Indeed, in recently expanding the permissible scope of searches incident to lawful arrests, the Supreme Court placed great reliance on the existence of probable cause to arrest as a justification for its holding. *United States* v. *Robinson, supra,* 42 U.S.L.W. at 4060; *Gustafson* v. *Florida, supra,* 42 U.S.L.W. at 4069-70.

Newsome, however, was searched incident to arrest for the violation of a statute which we have found unconstitutional in the main because it substituted mere suspicion for probable cause as the basis for arrest. Thus, we consider his warrantless search constitutionally defective because to sustain its validity would emasculate the essential Fourth Amendment protection which only probable cause provides.[14] Accordingly, we affirm.

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[14] We disclaim any intention to fashion a per se principle that all searches incident to arrests under statutes later declared unconstitutional are invalid.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of January, one thousand nine hundred and seventy-four.

Present: HON. IRVING R. KAUFMAN, *Chief Judge,*
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges.

73-2413

UNITED STATES OF AMERICA ex rel. LEON NEWSOME,

Petitioner-Appellee,

v.

BERNARD J. MALCOM, New York City Commissioner of Correction, JOHN J. CUNNINGHAM, Warden, New York City Correctional Center for Men, RICHARD NEWHALL, Deputy Warden, Queens Court Detention Pens,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

Judgment of the Court of Appeals.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the intervenor-appellant.

A true copy.

A. DANIEL FUSARO
Clerk

A. DANIEL FUSARO
Clerk

by Vincent A. Carlin